INDEPENDENT CONTRACTOR OR EMPLOYEE?

Special Problems Presented by Truck Drivers, Ministers and Others

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This office is frequently contacted in regard to the problem of the independent contractor. The basic question is whether an individual is an independent contractor or an employee. This can be a very important question in regard to whether an employer must cover the worker as an employee or whether the worker is indeed an independent contractor, and therefore, not subject to the employer's insurance coverage. Under the Kansas Workers Compensation Law if a worker is an employee, he cannot be required to contribute towards purchasing the workers compensation insurance. If the worker is an employee, then the employer must purchase the insurance and the employer cannot withhold funds from the employee's pay or commission to purchase the insurance.

In workers compensation the determination of whether a worker is an employee or an independent contractor is through the so-called "common law test" as applied by the Kansas Supreme Court or Kansas Court of Appeals. In other words there is no statute in our Workers Compensation Law that sets the definition for the legal requirements as to whether a certain individual is an employee or an independent contractor. An administrative law judge, or the Director, or other appeal courts will arrive at this determination by examining the prior decisions of our Supreme Court as to how they have defined an employee. In the case of Snyder v. Lamb, 191 Kan. 446, our Supreme Court said, "The question whether, in a given situation, an injured workman occupied the status of an independent contractor—as distinguished from an employee—has been before this court many times. Generally speaking, an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer except as to the result of his work." The court further noted in that case that the right of control test is not an exclusive test to determine the relationship, but other relevant factors are also to be considered. The court in the case of Evans v. Board of Education of Hays, 178 Kan. 275, noted "an independent contractor represents the will of his employer only in the result of his work and not as to the means by which it is accomplished." The court further noted in that decision, "It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control."

It is not always easy for an administrative law judge or an appeal judge to determine whether the purported employer did have the right of control over the worker's activities. As the court noted above, it is not whether the right of control is actually exercised, but rather it was reserved. The right to hire or discharge the worker also can be an important element in this test. Generally if an independent contractor does not perform a job he was contracted to do in a satisfactory manner, the legal recourse is not to discharge that person but to sue the person for breach of contract due to faulty workmanship or incomplete services. Usually an independent contractor cannot be discharged at the whim of the person contracting the work. An employee, however, can be subject to this type of termination. Generally where an independent contractor is involved the person engaging the independent contractor usually enters into a written agreement where a certain end result is contracted for and a certain set amount of money will be paid once that end result is completed. For instance if a home owner contracted with a plumbing service to build a bathroom for a certain amount of money and did not engage in the supervision of the independent contractor while he performed the job, then that person performing the job would most probably be an independent contractor. However, if a person was a contractor who built homes and contracted with a certain individual that he would be paid so much an hour while he did the plumbing work, generally gave directions how the plumbing work should be completed and had the right to

discharge that person at any time during the progress of the work, that person doing the work would most probably be an employee. The problems that exist are in the "gray" areas where there exists an extremely close question of whether that person is an employee or an independent contractor. All we can advise someone in that situation is that a person may be taking a financial risk if they do not cover the worker, because if it is determined that the worker is an employee, the employer would be required to pay the benefits even though he is uninsured. Sometimes general contractors and others will require certificates of insurance from all persons doing work for them, and therefore, avoid the contractor vs. employee question and protect themselves from workers compensation claims. The only problem with this is that some workers might complain that they are being required to carry workers compensation insurance on themselves even though they believe themselves to be employees. Therefore, the problem can arise even before an accident may occur. Several areas of special interest are noted below in regard to whether the relationship of employer-employee may exist.

When the law was revised in 1974, we had many inquiries whether church ministers would be considered employees or independent contractors. This question arose chiefly due to the fact that the Internal Revenue Service apparently considers most ministers self-employed and not employees. However, applying the "common law test" to most situations involving ministers indicated to our office that these people most probably were in the status of being employees rather than independent contractors. In most cases the minister is subject to discharge by a church board and they do have a certain right of control over his ministerial activities in regard to directions as to his duties and how he generally should perform them. There may be certain special circumstances where the minister would not be considered an employee, but in most cases reviewed, it was felt that the church should provide workers compensation coverage for the minister.

Another area of prime interest is in the trucking industry. We have a better guideline in this area due to the Supreme Court case, Knoble v. National Carriers, 212 Kan. 331. This case can also be applicable to other situations involving the question of employees vs. independent contractor. In the Knoble case the truck driver owned the tractor and leased it to the trucking firm. The employee, with his tractor, towed the trailer of the trucking firm. The truck driver and the trucking firm had a written contract which specifically stated the parties did not intend to create an employer-employee relationship. Truck drivers were not prescribed as to the number of days they had to work or times they had to work; however, they had to conform to the I.C.C. regulations as to the amount of time they could work in a given day. The truck drivers were given advances for expense money which was deducted from their payment on completion of delivery of a load. Some of the evidence brought out in the case was that the drivers received instructions from the dispatcher as to what commodities were to be hauled and where they were to be delivered. The drivers were required to check with the employer on a call-in basis at least once a day. The employee was paid on the basis of 70% of the gross revenue taken in by the truck and no social security or withholding tax was withheld or paid by the trucking firm. The Supreme Court in that case concluded that the lower court was correct in finding an employer-employee relationship to exist. The court in making this finding, noted, "that Respondent (trucking company) exercised or had the right to exercise as much control over the drivers of leased vehicles as it desired or was required to exercise in order to operate efficiently." The court further noted that there was no exact formula which may be used in determining if one is an employee or an independent contractor and concluded, "The determination of the relation in each instance depends upon the individual circumstances of the particular case."

It might also be noted that where one person is exclusively associated with another in order to conduct his business efficiently, the principal in the relationship, as a practical matter, must exercise or reserve some control over the workers' activities. Also it might be observed that a person who is willing to be considered an independent contractor may have a change of feeling as to this status once he is injured on the job.

Generally in a contact by an employer, insurance agent or employee, it is difficult for our office at times to give a definite opinion whether a person is an independent contractor or an employee. We can only point out the case law as noted above. The final determination of this question is up to an administrative law judge or appeal judge. Where an employer-employee relationship is found to exist, the employer would be required to pay the benefits even though he did not carry workers compensation insurance. The liability can be very high because of unlimited medical and present overall dollar maximums, along with the employer's attorney's fees.